

**Testimony in Support of SB 376
Before the House Natural Resources Committee
March 30, 2007**

Chairman McNutt, members of the Committee, thank you for the opportunity to testify in support of SB 376. My name is Gerald Mueller. I live at 440 Evans in Missoula, and my telephone number is 543-0026.

I testify on behalf and at the direction of the Clark Fork River Basin Task Force (Task Force), the entity that asked for the introduction of this bill. The Task Force was established in 2001 by a state statute in response to concerns about Clark Fork River basin water rights, water supply and water management. In this same statute, 85-2-350, the Task Force was assigned the job of writing a water management plan for the Clark Fork River Basin that identified options to protect the security of water rights and provided for the orderly development and conservation of water in the future.

The Task Force did prepare and send to the governor and the legislature in September 2004 the *Clark Fork Basin Watershed Management Plan (Plan)*. Much of the *Plan* was adopted into the State Water Plan in 2005.

Two key findings of the *Plan* were that because of lower basin hydropower water rights, water is unlikely to be legally available for appropriation for new water rights and water rights junior to the hydropower rights are at risk of being called most of the time. The lack of legal availability of water in the basin was confirmed in December 2006 by a DNRC ruling denying a water rights permit application by the Thompson River Lumber Company.

To remedy this situation the *Plan* proposed that the state seek to negotiate a contract with the US Bureau of Reclamation (BOR) for water stored in Hungry Horse Reservoir. By contracting for Hungry Horse water, the state could then lease it to support new basin water uses and to mitigate the need for the lower basin hydropower utilities to make a call on junior water right holders. In 2005, the legislature passed House Joint Resolution 3, which urged DNRC to do so. In a September 2006 meeting with Mary Sexton, the BOR Regional Director, Bill MacDonald, stated that the state can contract for an amount of water in Hungry Horse, but not pay for the water until it would actually be used. In effect, through a contract, the state can reserve Hungry Horse water to support future Clark Fork River basin water uses.

An existing statute, 85-2-141, caps the total amount of water that the state can lease throughout the entire state to 50,000 acre-feet. This cap was originally passed in 1985 as a result of concerns raised by the Energy Transportation Systems, Inc. (ETSI), coal slurry pipeline proposal and the US Supreme Court Decision in Sporhase vs. Nebraska. The State of South Dakota had agreed to sell ETSI 50,000 acre-feet of water from the Oahe Reservoir to allow coal to be transported from coal fields near Gillette, Wyoming to Arkansas and Louisiana. In Sporhase, the US Supreme Court ruled that water is an item of interstate commerce, and as such, the states may not simply prohibit its export. The legislature, therefore, sought to limit, but not prohibit, the use of Montana water for such ventures. Additionally, the legislature saw water marketing as an opportunity to fund other water related activities such as the statewide water rights adjudication, repairing state-owned water projects, repairing municipal water supply systems, etc. It therefore included in 85-2-141a requirement that federal water marketing revenue be shared with the state.

SB 376 would change 85-2-141 in two ways. First, it raises the total amount of water that the state may lease for beneficial purposes. Instead of a blanket 50,000 state-wide cap, the state may lease up to one million acre-feet for beneficial uses in Montana when the source of the water is Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Koocanusa, or Yellowtail reservoir. The 50,000 acre-feet state-wide cap remains in effect for water transferred out of state. The other change deletes the requirement that federal water marketing revenue be shared with the state. Water marketed by the federal government that is leased will not be a source of revenue for other purposes. Montana water users in leasing water from the state will pay only the costs of the leasing program. They will not be paying a water tax.

In closing, DNRC has not yet decided the amount of water that should be requested for Hungry Horse contract. Because of existing constraints on the operation of Hungry Horse, such as downstream endangered species flow requirements, we do not know how much of the BOR's existing 3.5 million acre-feet claimed by BOR in its water right for marketing would actually be available. The Task Force is convinced, however, that the request should not be limited to 50,000 acre-feet, the existing cap on state water leases. We believe that increasing the cap to 1 million acre feet consistent with honoring the concern about out of state water transfers would be good for Montana water users.

Please act favorably on SB 376.

Thank you.